ADDRESS

BEFORE THE

ESSEX BAR ASSOCIATION

DECEMBER 8, 1885.

BY

WILLIAM D. NORTHEND.

(From the HISTORICAL COLLECTIONS OF THE ESSEX INSTITUTE, Vol. XXII.)

SALEM:
PRINTED AT THE SALEM PRESS,
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THE laws and their administration upon the first settlement of the colony of Massachusetts Bay cannot be fully appreciated without a knowledge of the general history of the time, and an understanding of the important causes which led to the settlement.

The latter part of the sixteenth and the beginning of the seventeenth centuries were eventful in experiences from which originated the wonderful progress which has since characterized this and the mother country. Under the union of the State and the English Church, there had been a gradual but constant increase in the power of the state, sustained not only by military force but by the moral influence of the heads of the church who depended upon the civil power for their support and the maintenance of their ecclesiastical authority.

The result was the exercise of despotic power both in church and state. The church, organized under and empowered by acts of Parliament, required absolute and universal conformity to its creeds, its forms and its cere-

monies. Freedom of individual opinion was forbidden, and heresy declared to be a heinous crime. Ancient liberties were overthrown and the people ground down by cruel exactions. The only hope of relief was from the united action of an oppressed people, whose minds were being slowly but surely prepared for the eventful struggle which the wisest among them foresaw was inevitable. In the seventeenth century the issue was made. The contest was commenced by the friends of religious freedom. They were followed by the friends of civil liberty, and the two classes made common cause against the unjust and oppressive acts of the church and state. But in this, as has been true in all other similar contests, the religious issues overshadowed all others; and, although the friends of civil liberty did their part, yet the Puritan, as the champion of religious freedom was styled, is the only one known to history in the long protracted struggle against the ecclesiastical and civil power of the kingdom. Yet the men of that time little understood the far-reaching consequences of the struggle in which they were engaged. They looked only to their own special, temporary necessities. They did not seek the overthrow of the church, but its correction and purification. They were not, as a class, separatists, but non-conformists. They did not seek the overthrow of the monarchy and aristocracy of the realm, but to restrain despotic rule. Yet the contest in which they were engaged involved principles, which, when understood and acted upon, were to give an impulse to religious and civil liberty which no one at the time dreamed of, and such as the world had never before witnessed.

Difficulties increased with every step in this struggle. On both sides passions were aroused and prejudices strengthened. The persecution of the separatists, who

refused all recognition of the English Church, was so great that a large body of them emigrated to Holland and from there to Plymouth. The non-conformists were treated but little better, but persecution only intensified their zeal, and strengthened their opposition to the usurpations of the king and the mandates of the church.

In 1628, when the first step was taken toward the settlement of Massachusetts Bay, there was intense excitement throughout England. Affairs were approaching a crisis, and the first rumblings of the great upheaval which was so soon to follow, were heard. Prudent men became alarmed for the result, and feared that in the impending struggle, the tremendous power of the church and state would crush out all opposition and destroy all their hopes of reformation in the church, and of liberty under the government. The attention of many was turned to America. They felt that, as a last resort, they could establish themselves in the western wilderness, leaving an ocean between them and their persecutors, and that there they could rear a commonwealth to which they could bear their ark of the covenant, and worship God according to the dictates of their own consciences. A company, a majority of whom were non-conformists, made a purchase from the Plymouth Company, of the portion of their grant under their patent from James the First, bounded southerly by a line extending from a point three miles south of the most southerly part of the Massachusetts Bay, to a point three miles south of the most southerly part of Charles River, and from thence to the South Sea; and bounded northerly by a line extending from a point three miles north of the most northerly part of the Merrimac River, on a parallel of latitude, to the Atlantic Ocean on the east, and the South Sea on the west.

As the patent of the Plymouth Company gave only title

to the land, the new company applied for and obtained from the king a charter for a government of the proposed colony. The title of the company was "The Governor and Company of Massachusetts Bay in New England." Twenty-six persons were named in the charter, who, with "all such others as shall hereafter be admitted and made free of the company and society," should constitute the corporation. Endicott and a few others were sent over in the summer of 1628, and commenced a plantation at Salem; and in the spring of 1630, after a decision by the company that the charter and government be transferred to the colony, Winthrop, who had in the meantime been elected governor, embarked with about fifteen hundred others for Massachusetts Bay, and arrived at Salem in June.

Such was the commencement of the settlement of the Colony. Each year after, additional immigrants arrived, and, within ten years from the arrival of Endicott, settlements were made in more than one-half of the towns now incorporated in this county, and in 1643 the county was incorporated.[1]

The men who controlled the affairs of the colony were in entire accord with each other in their religious opinions.

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[1] By this act Essex County comprised Salem, Lynn, Wenham, Ipswich, Rowley, Newbury, Gloucester and Andover. By the same act Haverhill and Salisbury, which had before belonged to Essex County, with Hampton, Exeter, Dover, and Portsmouth, were incorporated as Norfolk County. In 1668, Amesbury, which had constituted a part of Salisbury, was incorporated, and in 1680, Haverhill, Salisbury and Amesbury were rejoined to Essex County. Copies of Norfolk County records to 1680 are in our clerk's office.

The northern boundary line of the colony under the description in the charter was run from a point on Lake Winnipiseogee three miles north of the source of the Merrimac River in a straight line to Casco Bay, so as to include all the settled portions of New Hampshire and Maine. From this originated the contests with Mason, who claimed all of New Hampshire under a grant, and with Gorges who claimed all the territory of Maine under a grant. In 1678 the colony purchased Gorges' claim, which quieted the title to Maine; and in 1737 the present boundary line between Massachusetts and New Hampshire was established by commissioners appointed by the crown.

Although in England they had been classed with the non-conformists, yet soon after their arrival here they entirely discarded the English Church, and established independent churches. They denounced the creed, organization, forms, ceremonies and ritual of the English Church, as the inventions of men, which had no authority over their consciences, and they planted themselves upon the Bible, as the only infallible guide. They declared as their only creed the scriptures of the Old and New Testament. They believed that every rule and command they contained were given through inspiration, to be equally applicable through all time and under all circumstances. They determined, with unanimity, that not only the churches, but the government of the commonwealth they were founding should be based strictly upon the teachings of the Bible, that there should be not a union of church and state, but a state fashioned by and subordinate to the churches. The church, from which they had separated themselves, was dependent upon the state, and the King was its head. They proposed a state, dependent upon the churches, whose heads, the elders or ministers, were to be consulted and their opinions taken upon all grave questions of authority.[2] The convictions at the time were well expressed by Rev. Mr. Cotton when he wrote, that it was "better that the commonwealth be fashioned to the setting forth of God's house, which is his church, than to accommodate the church frame to the civil state."

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[2] By the practice in the colony, the General Court, from time to time, propounded questions to the Ministers or Elders, which they answered in writing. The proceeding was similar to that under a provision of the constitution requiring the justices of the Supreme Judicial Court to give to either branch of the Legislature, or the Governor and Council, upon request, opinions upon important questions of law and upon solemn occasions. The opinions given by the ministers, which have been preserved, are very able, and will in logic and sound reasoning bear a not unfavorable comparison with opinions of justices given under this provision of our constitution.

By the charter the officers of the company were to consist of a Governor, a Deputy Governor and eighteen Assistants, who were to be chosen annually by the freemen at the General Court which was to be held on the last Wednesday of Easter term. Notwithstanding the charter provision for annual sessions, the people were so jealous of the right that they caused it to be reaffirmed by the General Court by an order passed in 1631, that a General Court be holden "once in every year at least."

The General Court was to consist of the Governor, Deputy Governor, Assistants and Freemen, and to hold quarter annual sessions, at which freemen were to be admitted, officers chosen, and laws enacted. In the charter it was provided that the Governor, Deputy Governor and Assistants might hold a court every month or oftener, at their pleasure, "for the better ordering of their affairs," and for other specified purposes. The powers thus given were construed to confer authority for holding courts of law; and from the beginning, the Governor and Assistants exercised judicial powers, and were known as the magistrates. The General Court in 1630 passed an act authorizing the Governor and Assistants to make laws.[3] But this was repealed in 1636 by an act declaring that the General Court had the exclusive right to make laws.[4] The charter having given the corporation express authority to determine who should be admitted as freemen, it was *ordered* by the General Court at its first annual session in the colony, in 1631, that for time to come none should be admitted to the freedom of the body politic "but such as are members of some of the churches within the limits of the same,"[5] and that there should be no misunderstanding as to what churches were intended, it was afterwards ordered that no person should

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[3] 1 Mass. Col. Rec., 79. [4] 1 Mass. Col. Rec., 117. [5] 1 Mass. Col. Rec., 87.

be admitted as freeman who was not a member of a church approved by the magistrates and churches,[6] and in 1637, it was ordered that no person but a freeman should be eligible to any office;[7] so that no person could vote, or hold any office, unless he was a member of a church established in conformity to the faith and modes of worship of the earliest churches.

At the annual meetings of the General Court, for the first few years, the Governor, Assistants and Freemen assembled and acted as one body, but in 1634, the number of freemen had so increased, and the inconvenience and danger of attending the court, as many of the plantations were remote from the place of its sessions, had become so great, that deputies, chosen by the freemen in their several plantations, were allowed to represent their constituents in the General Court, in all matters except the election of officers; and the freemen who could not conveniently attend were authorized to send their votes for officers, by proxy.[8] But in a short time differences occurred between the assistants and the deputies, which resulted in their organization in two distinct bodies, and laws were passed by their concurrent vote.[9] Such was the origin of the present General Court of Massachusetts.

For the first ten years the Court of Assistants exercised the entire judicial powers of the colony. In this period but very few laws or orders were passed. When complaints were made, the court, upon a hearing, determined whether the conduct of the accused had been such as in their opinion to deserve punishment, and if it had been, then what punishment should be inflicted, without regard to English precedents. There was no defined

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[6] 1 Mass. Col. Rec., 168.
[7] 1 Mass. Col. Rec., 188.
[8] 1 Mass. Col. Rec., 118, 166.
[9] 2 Mass. Col. Rec., 58.

criminal code, and what constituted a crime, and the measure of its punishment, were within the discretion of the court for the time being, in each case; and in determining what should be considered an offence, they had special regard to the peculiar circumstances and the purposes of the people in establishing their commonwealth; and looking to the Bible for guidance, they were more disposed to punish offenders for disregarding the ordinances of God and the rules of the churches, than for transgressing the laws of society.

The courts during this period, and afterwards under laws which were from time to time passed by the General Court, guarded with zealous care against the intrusions of persons of profligate lives, and of those who should attempt in any manner to promulgate doctrines contrary to those adopted by the churches. The company claimed the right of exclusion upon the ground that they owned the territory, and had obtained a charter authorizing them to determine who should be their associates, and to expel any person who should attempt to annoy their inhabitants. They gave full notice of their intention to establish a church and government in accordance with their own views, and of their determination that no persons should be permitted to come, or remain within the limits of their jurisdiction, who should attempt to frustrate this purpose, or interfere with the order of affairs that they should establish.

A reference to a few cases will serve to illustrate the spirit of the time. In 1631 Philip Ratliffe, for uttering malicious and scandalous speeches against the government and the church at Salem was, by the Court of Assistants, ordered to be whipped, to have his ears cut off, pay a fine of forty pounds and to be banished.[10] The same year the same court,

[10] 1 Mass. Col. Rec., 88.

for an offence not named, ordered that Thomas Gray's house at Marble Harbor (Marblehead) be pulled down, and that no Englishman give him "house room" or entertainment.[11] In August, 1646, Mary, the wife of Thomas Oliver of Salem, for slandering the elders of the church, was sentenced to wear a cleft stick upon her tongue for half an hour.[12] In 1644, William Hewes and John his son, for terming such as sing in the congregation, fools, and William Hewes, also, for charging Reverend Mr. Corbitt with falsehood in his doctrine, were ordered to pay a fine of fifty shillings each, and to make humble confession in a public meeting at Lynn.[13] In 1643, Roger Scott for repeated sleeping in meeting on the Lord's day, and for striking the person who waked him, was, at Salem, sentenced to be severely whipped.[14] In another part of the colony, at the first Court of assistants, held in 1630, Thomas Morton of Mount Wollaston, called Merry Mount, now Quincy, for profligate conduct and troubling the Indians in his vicinity, was ordered to be set in the "bilbowes," to be sent prisoner to England, his goods confiscated to defray the expense of his transportation, and for the payment of his debts, and to make satisfaction to the Indians for a canoe he had taken from them; and it was further ordered that after the removal of his goods, his house be burned to the ground in the presence of the Indians he had wronged;[15] and in March, 1631, Sir Christopher Gardner who had passed much of his time

"With roystering Morton of Merry Mount,"

and who was living with a lady he called his cousin, upon

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[11] 1 Mass. Col. Rec., 92. [12] Felt's An. Salem, 118. [13] 1 Essex Co. Ct., 160.
[14] 1 Essex Co. Ct., 134, 148. [15] 1 Mass. Col. Rec., 75.

receipt by the Governor of information of two wives in England,

"Whom he had carelessly left behind,"

after a long pursuit, was captured and sent back to England.[16] On the same day, one Nich. Knopp, for pretending to cure scurvy by water of no value, which he sold at a very dear rate, was ordered to pay a fine of five pounds or be whipped, and made liable to an action by any person to whom he had sold the water.

But the people soon became alarmed at the extent of personal discretion exercised by the magistrates, and felt that their liberties could not be safe under such an administration of law. The deputies, who represented the commons, as the freemen were styled, demanded a code of written laws, and in 1635, according to Winthrop, "the deputies, having conceived great damage to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed that some men should be appointed to frame a body of grounds of laws, in resemblance to *magna charta*, which being allowed by some of the ministers and the General Court, should be received for fundamental laws." Accordingly the governor and others were appointed by the General Court for the purpose.[17] But it does not appear that they performed the duty assigned them, and in 1636, another committee, composed of magistrates and ministers, was appointed.[18] The records do not show that this committee acted, but according to Winthrop, Mr. Cotton, of the committee, reported "a copy of Moses his judicials, compiled in an exact method, which was taken into further consideration till the next general court." They

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[16] 1 Mass. Col. Rec., 83. [17] 1 Mass. Col. Rec., 147. [18] 1 Mass. Col. Rec., 174.

did not prove satisfactory to the people, and were never adopted. In March, 1638, the General Court ordered that the freemen of the several towns should assemble and collect the heads of such necessary and fundamental laws as they should deem suitable, and report the same to the Governor before the fifth day of June, when a committee of magistrates and ministers of which Rev. Nathaniel Ward was a member, would make a compendious abridgment of the same for the consideration of the General Court in the autumn.[19] The next action upon the subject was in 1639, when another committee was directed to peruse all the "models" which had been or should be presented, "draw them up into one body," and send copies to the several towns.[20] This was done. In March, 1640, another order was passed in regard to the "breviate of laws" which had been sent to the towns, in which the desire was expressed "that they will endeavor to ripen their thoughts and counsels about the same by the General Court in the next 8th month."[21] The next action taken was in October, 1641, when Mr. Ward was requested to furnish a copy of the liberties, etc., and at the same session it was ordered that nineteen copies of the same be transcribed and sent to the several towns,[22] and at the session in December, 1641, "the body of laws formerly sent forth among the freemen, etc., was voted to stand in force, etc."[23] It was further ordered that these laws should be read at each General Court for three years, and such of them as were not in that time repealed, should "stand so ratified."[24] In March, 1644, a committee was appointed to consider the Body of Liberties and report what should be repealed or

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[19] 1 Mass. Col. Rec., 222. [20] 1 Mass. Col. Rec., 279. [21] 1 Mass. Col. Rec., 292.
[22] 1 Mass. Col. Rec., 340, 344. [23] 1 Mass. Col. Rec., 346.
[24] 8 Mass. Hist. Coll., 3rd series, 237.

allowed.[25] There is no record of any report having been made.

The great delay in the preparation and adoption of this code of laws was caused by the magistrates and ministers who desired to create a common law for the colony based upon customs arising out of, and adapted to, the peculiar condition and circumstances of the people; and who were apprehensive that the adoption of a rigid code of written laws might prove a hindrance to the growth of such a system; and, besides, that any code of written laws which would be approved by the people must necessarily be repugnant to the laws of England, which by their charter they were forbidden to make.

The Body of Liberties, as adopted, was prepared by Rev. Nathaniel Ward, who had been a minister in Ipswich, in this county, for about two years. He had been educated to the law and practised in England, before he studied for the ministry. He was a man of great ability, and his legal training admirably fitted him for the performance of this important duty. The code comprised one hundred laws, civil and criminal.[26] The civil laws it contained were far in advance of the laws of England at the time, and were in substance adopted in every subsequent codification of the laws of the colony, and some of them are in force at the present time, and others form the basis of existing laws. The criminal laws were taken principally from the Mosaic code, and although many of them at the present day seem harsh and cruel, yet, as a whole, they were very much milder than the criminal laws of England at the time, and the number of capital offences was greatly reduced. The Body of Liberties contained the following brief bill of rights: "No man's life

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[25] 2 Mass. Col. Rec., 61.

[26] 8 Mass. Hist. Coll., 3rd series, 216.

shall be taken away, no man's honor nor good name shall be stained, no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children, no man's goods or estate shall be taken away from him, nor any way indamaged under color of law or countenance of authority, unless it be by virtue or equity of some express law of the country warranting the same, established by a General Court and sufficiently published, or in case of defect of a law in any particular case, by the word of God. And in capital cases, or in cases concerning dismembering or banishment, according to that word to be judged by the General Court." No reference was made to the common law of England which had been made subservient to the demands of the hierarchy and king, but in the place of it, all legislation in regard to offences, was based upon the Bible. The Mosaic code was made their guide, and the capital offences were supplemented by marginal reference to the book, chapter and verse in the Bible, from which their punishments were derived.

With the increase of the population of the Colony came a necessity for additional tribunals of justice, and in March, 1636, four local courts, each to hold quarter annual sessions, were established by the General Court.[27] One of these was to be held in Ipswich to which Newbury should belong, and one in Salem, to which Saugus, now Lynn, was to belong. They were known as Quarter Courts. These courts were to be held by any magistrate residing in or near the said towns, and such other persons as associates, as the General Court should appoint from a list of persons nominated by the several towns for the purpose. They were known as commissioners. The

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[27] 1 Mass. Col. Rec., 169.

General Court was to appoint a magistrate specially for each court, but any other magistrates could attend and take part. The court was to consist of five members, of whom one at least should be a magistrate, and three (one being a magistrate) should constitute a quorum. To these courts was given exclusive jurisdiction in all civil cases, whereof the debt or damage did not exceed ten shillings, and in all criminal cases not concerning life, member or banishment. An appeal was given to the Court of Assistants, or the Great Quarter Court, as it was styled in the law.[28] The first session of this court was held at Salem June 27, 1636.[29]

In 1641 the General Court established four quarter annual courts in this county, two to be held at Ipswich, and two at Salem, to be presided over by magistrates and commissioners, substantially as under the law of 1636; but after 1650 the commissioners were elected by the people of the several counties. Provision was made for the session of a grand jury once a year, in each place.[30] To these courts was given the jurisdiction, civil and criminal, before exercised by the Court of Assistants, except on the criminal side, trials for life, limb or banishment, which were reserved for the Court of Assistants, and in civil cases the Court of Assistants reserved concurrent jurisdiction, where the damages exceeded one hundred pounds. In the same law, Salisbury and Hampton were placed under the jurisdiction of the Ipswich court. A right of

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[28] 1 Mass. Col. Rec., 175.

[29] The records of this court are in the clerk's office in the Court House, Salem. From them it appears that the first session of this court was held by "Cp John Endicott Esqr, Cpt Nath: Turner, Mr Townsend Bishopp Mr Tho: Scrugge." The records in the first volume were copied by Abner C. Goodell, Esq., and published in volume seven of the Essex Institute Historical Collections.

[30] Mention is made in the Colonial records of Juries of inquest in 1630, of petty Juries in 1633 and 1634, and of grand Juries in 1635. Mass. Col. Rec., 77, 78, 110, 118, 148.

appeal to the Court of Assistants was also given, in all cases. These courts had probate jurisdiction, and the clerks performed the duties of register.[31] They also laid out highways, licensed taverns, and were charged to see that there was an able ministry and that it was well supported; and in 1664 were authorized to admit freemen. The judges of these courts were also given equity jurisdiction by an act of 1685, just before the charter was declared void. From an early period, assistants or magistrates were invested with substantially the powers of a justice of the peace, and had jurisdiction in civil cases, except where the title to land was in issue, and the debt did not exceed twenty shillings, afterwards increased to forty shillings,[32] but I do not find that any justices of the peace, *eo nomine*, were appointed in the colony, except the Governor and Deputy Governor for the time being, Sir Richard Saltonstall, Mr. Johnson, Mr. Endicott and Mr. Ludlow of the assistants, who were appointed in 1630.[33]

By an act passed in 1638, the General Court was, from time to time, to appoint, in each town in which there should be no resident magistrate, three persons as commissioners of small causes, two of them to constitute a quorum. By a subsequent act these commissioners were to be approved by the several County Courts. They were given, by different acts, substantially the powers of single magistrates.[34] Selectmen of towns in which there was a magistrate were empowered to try civil cases under forty shillings in which the magistrate had a personal interest.[35] The General Court appointed annually, in each town, a clerk of the writs who was authorized to grant attachments and sum-

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[31] 1 Mass. Col. Rec., 325. [32] I Mass. Col. Rec., 89 239, and 2 Mass. Col. Rec., 279.
[33] 1 Mass. Col. Rec., 74. [34] 1 Mass. Col. Rec., 239. [35] 2 Mass. Col. Rec., 162.

mons, replevin writs, take replevin bonds and issue summons for witnesses.[36]

The Governor or Deputy Governor and two Magistrates were authorized, by an act passed in 1639, to try cases in which a stranger or non-resident was a party, and to transmit their records of the same to a court having jurisdiction, there to be entered and judgment rendered. It was intended to relieve such parties from the delays incident to a trial in the ordinary course of justice.[37] This law was in force but a short time.

Upon the completion of the judicial system of the colony the jurisdictions of the several courts were as follows:

The General Court retained all legislative powers and limited appellate authority from the Court of Assistants, and certain supervisory powers over all the courts.

The Court of Assistants had exclusive jurisdiction in all criminal causes extending "to life, limb, or banishment," concurrent jurisdiction with the County Courts in all civil causes in which the damages were more than one hundred pounds, and appellate jurisdiction from the County Courts. It also, by an act passed in 1674, was given admiralty jurisdiction. It had substantially the same powers afterwards conferred on the Superior Court of the Province, and the Supreme Judicial Court of the State. But upon appeals from a County Court, the evidence given in that court, and no other, was allowed. The same rule was applied upon appeals from the Court of Assistants to the General Court. The sessions of this court were all held in Boston.

The County or Inferior Quarter Courts had jurisdiction in all cases and matters not reserved to the Court of Assistants, or conferred upon single magistrates and commis-

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[36] 1 Mass. Col. Rec., 344.

[37] 1 Mass. Col. Rec., 264.

sioners of small causes, including matters of Probate. They had essentially the powers, except in matters of probate, which were afterwards conferred on the Court of Common Pleas and General Court of Sessions of the Province and of the State; and now upon the Superior Court and Boards of County Commissioners. Single magistrates and commissioners of small causes, or town courts, were invested with substantially the powers of a justice of the peace.

The writs, declarations, complaints, indictments, pleadings and course of proceedings in the courts were simple, brief and informal. For the first twenty years the testimony on a trial was written down by the clerk of the court and became a part of the records in a case. But in 1650 on account of the inconvenience of "taking verball testimony in courts by reason of many imperitances in their relations, so that the clarks cannot well make a perfect record thereof" it was ordered, that henceforth all testimony be given in writing to be attested in court if the witness lived within ten miles of it, and before a magistrate, if the witness lived at a longer distance. These papers, or affidavits, went to the jury, who returned them into court with their verdict. From this it is evident that witnesses were never cross-examined in court, and that the sole duty to be performed by a party or his attorney upon trial was to argue his case. Little attention was paid to the rules of evidence. Upon a trial when jurymen were not clear in their judgment and consciences they were authorized "in open court to advise with any man they should think fit to resolve or direct them before they gave their verdict."[38] The juries were made judges of the law and the fact, although they had a right to find special verdicts.[39]

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[38] Body of Liberties.

[39] 3 Mass. Col. Rec., 425.

When upon a trial there was insufficient evidence to convict, juries were authorized to find that there were strong grounds of suspicion; and upon this finding the court would give sentence for what it appeared to them, on the trial, the defendant was guilty of, though not charged in the indictment or found by the jury.[40] Hutchinson states that he has "met with instances of one of the court standing up after a verdict of the petit jury of not guilty in a capital trial, and charging the prisoner, in open court, with burglary and theft, which were not capital, and a new trial ordered upon such charge."[41]

If the court disapproved of the verdict of a jury they could refuse to accept it, in which event the cause was carried to the next Court of Assistants or to the General Court as the case might be, for determination. On the trial of Anne Hibbins for witchcraft in 1656, the jury found the defendant guilty, but the Court of Assistants, before whom she was tried, refused to accept the verdict, whereupon the case was carried to the General Court which sustained the verdict of the jury, and she was convicted and executed.[42] This was the law until 1672, when

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[40] In 1681, Governor Hinckley of Plymouth wrote to Judge Stoughton for advice on a case which had occurred at Plymouth. Judge Stoughton replied: "The testimony you mention against the prisoner, I think is clear, and sufficient to convict him; but, in case your jury should not be of that opinion, then, if you hold yourselves strictly bound by the laws of England, no other verdict but *not guilty* can be brought in. But, according to our practice, in this *jurisdiction*, we should punish him with some grievous punishment, according to the demerit of his crime, though not found capital."

[41] 1 Hutchinson, 401.

[42] "The Magistrates not receaving the verdict of the jury in Mrs. Hibbins, hir case, having been on trial for witchcraft, it came, & falls of course to the Genn-erall Court, Mrs. Ann Hibbins was called forth, appeared at the barr; the indictment against hir was read, to wch she answered not guilty, & was willing to be tried by God and this Court. The evidences against hir was read, the parties witnessing being present, hir answers considered on, and the whole Court, being mett together, by theire vote, determined that Mrs. Anne Hibbins is guilty of witchcraft, according to the bill of indictment found against hir by the jury of life & death. The Gouennor in open Court, pronounct sentenc accordingly, declaring she was to goe from the barr to the place from whence she came, & from thence to the place f execution, & there to hang till she was dead."—4, part 1 Mass. Col. Rec., 269.

the General Court enacted that the verdict of a jury, the court having upon the trial given full explanation of the law, should be accepted, and judgment rendered upon it; and that if a party felt aggrieved by the verdict he might seek his remedy by attainting the jury.[43] This was modified in 1682, by an act requiring that the party seeking this redress should specify in writing the grounds of his attaint, and that if he failed in his action, he should be fined ten pounds, and pay forty shillings to each juror, and made subject to an action of slander by the jurors he had charged with corruption.[44]

The actions in civil cases were replevin, debt, trespass and case. Case was the most common form, and was employed in suits to recover lands as well as for damages for breach of contract.

In order to expedite proceedings in court, a law was passed in 1656 authorizing the fining of a party twenty shillings an hour for the time occupied in his plea beyond the time of one hour.[45]

Notwithstanding the fact that the General Court made no recognition of the Common Law in its enactments, it was not entirely regardless of its value, and in 1647 ordered the importation from England, of two copies each of the following books, Sir Edward Coke on Littleton, Book of Entries, Sir Edward Coke on Magna Charta, The New Terms of the Law, Dalton's Justice of the Peace, Sir Edward Coke's Reports.[46] But there was no change in practice, and I find no evidence of any formal recognition of the Common Law during the existence of the Colony, and but little reference to its principles by the judges.

During the colonial period of fifty-five years, the only

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[43] 4 part 2 Mass. Col. Rec., 508.
[44] 5 Mass. Col. Rec., 449.
[45] Washburn, 52.
[46] 2 Mass. Col. Rec., 212.

men of the assistants or magistrates who had been educated in the law were Winthrop, Bellingham, Humphrey, and probably Pelham and Bradstreet. But they were as desirous of establishing a bible commonwealth, and had as little regard for the Common Law or legal precedents, as any of their associates; and during this entire period the only person of legal education who practised in the courts was Thomas Lechford, who after a practice of two years, for tampering with a jury, was forbidden to practise. He soon after returned to England, and in 1642 published a satirical book entitled "Plain dealing, or News from New England." But in this period there were men who practised as attorneys. They were ignorant of the principles of the law, were bound by no oaths, and were irresponsible to the courts. It is not unreasonable to suppose that, as a class, they did not have the confidence of the people. The names are given of five persons who acted in this capacity. Three were, or had been, merchants, one an apothecary and the other a tailor. The conduct of this class of practitioners was such as called for a law against barratry, which was passed in 1641; and in 1663 the General Court passed an act excluding "usual and common attorneys" from a seat in their body. As legal proceedings were conducted with but little regard to rules or precedents, there was but little occasion or opportunity for attorneys learned in the law.

The proper limits of this address will not permit any detailed statements of the various laws enacted to insure conformity in religious matters, nor of the proceedings against members of the Church of England, the anabaptists antinomians and Gortonists for their interferences and attempts at proselyting, which resulted in the banishment of the Browns, Roger Williams, Mrs. Hutchinson, Wheelwright, Gorton and many others; nor of the punish-

ment inflicted upon the Quakers for their obstinate and determined intrusions in violation of the laws; nor of the struggle between the enemies of the colony in England aided by prominent and influential men who had been sent back, and the friends of the colonists aided by frequent accessions of agents sent over by the colony.

With the colonists, for the first ten years under the charter, it was a constant struggle for political life. The next twenty years, under the Long Parliament and the Administration of Cromwell, the colonists enjoyed comparative peace and quiet. But upon the accession to the throne of Charles the Second, in 1660, complaints were made by the friends of those who had suffered by the enforcement of the rigorous laws of the Colony, and strongly pressed. Complaints were also made by Mason and Gorges that the Colony, by a wrongful construction of its charter, had extended its boundaries so as to include New Hampshire and Maine which they claimed to own. The colonists, through their agents, attempted to justify their acts. But the political power of the Puritans in England was broken upon the death of Cromwell, and the colonists found few men, in or out of Parliament, to espouse their cause. Upon the report of commissioners sent over to investigate the affairs of the Colony, the King required the repeal, or modification, of many of the laws. Accordingly the laws against the Quakers were suspended,[47] and the law for the admission of freemen modified, so that English subjects, who were freeholders, ratable to a certain value, and who were certified by the minister of the place in which they lived to be orthodox and not vicious in their lives, might be made freemen, although not members of a church.[48] Other requirements of the King the colonists de-

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[47] 4, part 2 Mass. Col. Rec., 34.

[48] 4, part 2 Mass. Hist. Coll., 118.

layed in performing, or performed only in part. Complaints multiplied. Finally, a writ of Quo Warranto was issued against the Government of the Colony, and a judgment of a forfeiture of the Charter was rendered in 1684. The King died the same year. His successor, James the Second, after the temporary appointment of Dudley, commissioned Andros as "Captain General and Governor in chief" of all New England. He arrived at Boston in December, 1686. In March, 1687, he established a Superior Court, a Court of Common Pleas and a Court of Chancery, and appointed Judges. He also appointed Justices of the Peace, and continued commissioners of small causes. These, with the exception of the Court of Chancery, which was disapproved by the King, continued until the revolution, and deposition of Andros, in 1689.

Upon the departure of Andros the charter government was reassumed by the old Magistrates, to whom were added other influential inhabitants, with the venerable Bradstreet[49] as Governor, under the name of "A council for the safety of the people and conservation of the Peace." The colony laws were adopted for their government.

This system continued until the arrival of Governor Phipps with the Province charter, in May, 1692. The charter passed the great seal in October of the preceding year. Under it the Colonies of Massachusetts Bay and New Plymouth and the Province of Maine and Nova Scotia and the intervening territory, were united under one government, with the corporate name of "The Province of the Massachusetts Bay in New England." The Government, under this charter, consisted of a Governor, Deputy Governor and Secretary, appointed by the King; and of Assist-

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[49] Governor Bradstreet lived the last part of his life, and died, in a house on the estate next west of Plummer Hall in Salem.

ants or Councillors to be chosen by the General Court, and a House of Representatives to be chosen by the people, annually. They were to meet in General Court or Assembly on the last Wednesday of May in each year. Councillors were appointed in the charter to hold their office until the session of the General Court in May 1693; and, for the time being, each town was to elect two representatives. Authority was given for the General Court to determine, for the future, the number of representatives from the several towns. By the charter, the power was given to the Governor to negative any or all acts of, or elections by, the General Court; and, by an explanatory charter in 1726, the Speaker of the House was to be approved by him. All laws were to be transmitted to England, and if not disallowed within three years after they were received, they were to continue in full force.

The people were disappointed at the powers reserved to the King by the charter, yet by it the proceedings under the Government were substantially like those under the colonial charter, and in accord with the customs and traditions of the people. But a very important change was made in the provisions for a judicial system. Under the new charter, full power was given to the General Court "to erect and constitute judicatories and courts of records or other courts," for the trial of all civil and criminal causes; and to the Governor was given the appointment of all judges, Commissioners of Oyer and Terminer, and other officers of the Court. By these provisions the judiciary was, in theory at least, divorced from the Legislative department of the Government. It was a very great advance. For the first time in our history, justice was to be administered by tribunals independent of the law-making power, and an approach was made to a government of laws and not of men. By the Charter, jurisdiction in all

matters of probate was given to the Governor and Council, which they delegated to Judges of Probate appointed by the Governor for each County, with right of appeal to the Governor and council. By this Charter, liberty of conscience was granted to all Christians except papists.

For several months before the arrival of Governor Phipps great excitement prevailed, especially in this county, upon the subject of witchcraft, and a large number of persons after examinations before magistrates were bound over and committed to jail to await the action of a grand jury. The *de facto* government which had been maintained from the time of the expulsion of Andros was superseded by the government established under the charter. It seems to have been assumed that the colony laws which had been adopted by Andros were not in force upon the granting of the charter, and as witchcraft was not a common law offence, that until the passage of a law by the General Court of the Province, prosecutions could only be made under the English statute against witchcraft of James the First. Governor Phipps, without waiting for the action of the General Court, appointed commissioners of Oyer and Terminer to act in and for the counties of Suffolk, Essex and Middlesex. I do not propose to discuss in detail the proceedings which followed. In passing upon them, the circumstances, conditions, beliefs and superstitions of the people of the period should be understood and considered. It is difficult at the present day to comprehend the universal and terrible belief in witchcraft which prevailed among the people of all Christian denominations throughout the world. There was no conviction of the people, educated and uneducated, more thorough and unquestioned. The belief was, that the Devil, at times, possessed himself of a human being, and through the agency of his victim in-

flicted incalculable misery and suffering upon whole neighborhoods; and we can but faintly conceive of the awful terror and consternation which pervaded a whole community upon the rumor of occurrences which suggested the probability of such a visitation by the Evil One upon one of its members, or of the dire imaginings it excited. Chief Justice Matthew Hale, in his charge to the jury on the trial of Rose Cullender and Amy Duny for witchcraft in 1665, gave testimony to this universal belief of his time. He said: "That there were such creatures as witches he made no doubt at all. For first, the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument in their confidence of such a crime. And such hath been the judgment of this kingdom, as appears by an act of Parliament which hath provided punishments proportionate to the quality of the offence."[50]

In the sixteenth and seventeenth centuries, many thousands of persons of both sexes, and the number has been estimated at thirty thousand in Great Britain, seventy-five thousand in France, one hundred thousand in Germany, and large numbers in Italy, Spain, Switzerland, Sweden and Norway were convicted of witchcraft and burned, drowned or hanged.[51] By an early law of the colony, witchcraft was made punishable by death. Within half a century before the trials for witchcraft in this county, accusations against persons for witchcraft had been made in Boston, Dorchester, Cambridge, Springfield, Hadley, Groton, Newbury, Rowley and Salisbury, and in Hartford, Connecticut, where several were convicted and hanged, and in Hampton, Portsmouth and

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[50] 6 State trials, 687.

[51] 2 Mem. Hist. Boston, 131.

Salmon Falls in New Hampshire.[52] During this period, in the colony, five persons were executed upon conviction of witchcraft: one in Charlestown, one in Dorchester, one in Springfield and two in Boston. One of those executed in Boston was Anne Hibbins, the widow of a magistrate.[53] Within a few years before the Salem witchcraft, as it is called, all the instances of witchcraft in the colony with all the circumstances attending them were collected and published in a book. Accounts of the trial before Sir Matthew Hale were also published and other works on demonology which were extensively circulated and read. The reading of these books was undoubtedly an exciting cause for what took place. The only peculiarity here was in the intense excitement which pervaded the whole community, and in the number of the prosecutions, convictions and executions. Here the distemper was contagious and resulted in a moral epidemic.

> "Be not too swift in casting the first stone,
> Nor think New England bears the guilt alone.
> This sudden burst of wickedness and crime
> Was but the common madness of the time,
> When in all lands that lie within the sound
> Of Sabbath bells, a witch was burned or drowned."

Governor Phipps was a believer in witchcraft, as was Lieut. Governor Stoughton who was appointed one of the commissioners of Oyer and Terminer. The commissioners of the court were appointed May 27, 1692. The commissioners, or judges, were William Stoughton, Chief Justice, Nathaniel Saltonstall, who declined the appointment, Jonathan Corwin, John Richards, Bartholomew

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[52] 2 Hutchinson, 20.

[53] Margaret Jones of Charlestown was executed at Boston June 15, 1648, the wife of Henry Lake of Dorchester 1650(?). Anne Hibbins of Boston June 19, 1656. Mary Parsons of Springfield May 29, 1657, and Goody Glover of Boston November 16, 1686. 2 Mem. Hist. Boston, 133. 2 Hutchinson, 24.

Gedney, Waitt Winthrop, Samuel Sewall, John Hathorne and Peter Sergeant Associate Justices, five of them to constitute a quorum. Stephen Sewall[54] was appointed Clerk, and Thomas Newton Attorney General. Anthony Checkley succeeded him July 22, 1692. George Corwin was appointed Sheriff. The incumbent of this office was in the early days of the colony styled Beadle and afterwards Marshal. The court convened at the Court House in Salem June 2d. A grand jury was impanelled which speedily made presentments, and trials commenced. The first person tried was Bridget Bishop, alias Oliver, of Salem. She was convicted June 8 and executed June 10.[55] All the details of the trial cannot be given, as the records of the Clerk were never made up, or if made up,

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[54] Stephen Sewall's house was on Essex street, Salem, where the Hook building now is. His estate of several acres extended to North river. Sewall street formed part of the eastern boundary of his estate.

Nathaniel Saltonstall was grandson of Sir Richard Saltonstall and grandfather of Richard Saltonstall, a justice of the Superior Court of the Province. Nathaniel Saltonstall married a daughter of Rev. John Ward, son of Rev. Nathaniel Ward, from whom was inherited the estate in Haverhill on which the family lived. It was until within a few years known as the Saltonstall place. It is now owned and occupied by the Duncan family.

Bartholomew Gedney lived in a house which stood on the northern corner of Summer and High streets, Salem.

John Hathorne lived on Essex street, next westerly from Price's block Salem.

Samuel Sewall lived in Boston. He was son of Henry Sewall of Newbury who lived on Parker street, near the site of the old elm tree of Newbury, and grandson of Henry Sewall of Rowley.

Jonathan Corwin lived in the house now standing on the westerly corner of Essex and Beckford streets, Salem; annexed to it is the apothecary shop of Dr. Farrington.

George Corwin lived in a house on the spot where is now, what is known as the Dr. Fiske house, on Washington street, near the Eastern railroad depot, Salem.

[55] The Court House, in which the trials were held, stood in the middle of what is now Washington street, near where Lynde and Church streets, which did not then exist, now enter it, fronting toward Essex street. The building was also used as a town house; Washington street being, for this reason, then called "Town House Lane." Bridget Bishop owned a house on what is now Washington street, in whole or in part on the site of the present Cate's block, where she lived prior to her marriage to Edward Bishop. 2 Upham, 253. The death warrant of Bridget Bishop and return upon it is in the clerk's office, Salem, as are also the affidavits or depositions of witnesses, and some of the pins produced at the trials.

have been lost or destroyed. The death warrant and return upon it of Bridget Bishop is the only death warrant preserved. After the trial of Bridget Bishop the court adjourned to June 29. In the interim, the Governor and Council, in accordance with the colonial practice, sought the advice of the principal ministers of Boston and vicinity, who, June 15, made reply in writing, in which they advised that all the proceedings should be "managed with an exceeding tenderness toward those who may be complained of, especially if they have been persons formerly of an unblemished reputation;" that the evidence "ought certainly to be more considerable than barely the accused person's being represented by a spectre unto the afflicted" and that they could not "esteem alterations made in the sufferers, by a look or touch of the accused to be an infallible evidence of guilt." Nevertheless they recommended "speedy and vigorous prosecutions," "according to the directions given in the laws of God and the wholesome statutes of the English nation, for the detection of witchcrafts."

The General Court convened June 8th when an act was passed reviving the colony law against witchcraft.[56] The Court of Oyer and Terminer again met June 29, and continued, with several adjournments, to September 17, when it adjourned to the first Tuesday in November, but before that time the Court was dissolved. During these sessions of the Court nineteen persons were convicted and hanged, and one, in accordance with the laws of England by which this Court was governed, was pressed to death for refusing to plead. The Superior Court, established by the General Court in November, had jurisdiction in cases of witchcraft;

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[56] Laws against witchcraft were passed October 29, and December 14, 1692, which were disallowed August 22, 1695.

and, in January succeeding, indictments for the offence, in this County, were found against about fifty persons, mostly women. All who were tried were acquitted except three, who were pardoned by the Governor. All not tried were discharged upon payment of thirty shillings each to the Attorney General.[57] At the first session of this Court in Middlesex several persons who were in jail under indictment for witchcraft were tried, but the juries acquitted them all. The excitement on the subject had subsided, the sober judgment of the people had reasserted itself, and the epidemic had passed away.

Many severe criticisms and some very unjust, have been made upon the conduct of the Judges in these trials. It has been generally assumed that in not assigning or allowing counsel for the prisoners, they were influenced by a desire for conviction, and that in the admission of evidence they were governed by their own personal discretions influenced by their belief in witchcraft and by the intense and for the time, almost insane impulses of the people who clamored for conviction. But neither of these assumptions is correct. By the laws of England at the time, and they were not changed in this respect for many years after, counsel were not assigned or allowed in capital cases, excepting on questions of law when the Court was in doubt. Sir Harry Vane on his trial in 1662, and Algernon Sidney in 1683, were refused counsel to argue to the court questions of law they had raised. The theory was that the Judges were counsel for the prisoner.

The rules adopted for the admission of evidence were the same established by the practice in the Courts of England. Sir Matthew Hale, on the trial before him, which

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[57] It was one of the hardships of the law at that time that no prisoner could be discharged without payment of this fee.

has been referred to, admitted, without question, not only spectral and other evidence of precisely the same character with that admitted on the trials here, but admitted the testimony of an expert upon the subject of witchcraft. As the courts in these trials were dealing with supernatural powers and influences, the conclusion was not illogical that this kind of evidence was legitimate, that the supernatural should be dealt with through the supernatural. But upon the character of the evidence and the rules the jury should observe in considering it, which were plainly within the discretion of the judges as counsel for the prisoners, Sir Matthew Hale made no comment. He uttered no word of caution to the jury, and simply "desired them strictly to observe their evidence, and desired the great God of heaven to direct their hearts in this weighty thing they had in hand. For to condemn the innocent and to let the guilty go free were both an abomination to the Lord." The judges here followed the example of Sir Matthew Hale; they did not follow the advice of the elders.

No better illustration can be given of the fallacy of the views of those who look upon legal rules as only a clog and hindrance in the administration of justice. Under the rules of law, as now fully established, none of the evidence upon which the convictions were found would be admitted. Spectral and kindred evidence could not be allowed, and without it not one of the accused could have been convicted.

The first enactment of the first General Court under the Province charter provided that all the local laws of the late Colonies of Massachusetts Bay and of New Plymouth, not repugnant to the laws of England, nor inconsistent with the new charter, should remain in full force in the respective places until the tenth of November next. In November the provision was renewed without limitation as to time. A short time before the end of three years

from the time these enactments were certified to England, they were disallowed by the Privy Council, and directions given "that in any new law to be enacted for the said purpose, the laws to be continued be therein expressed and particularly specified."

The first act for the establishment of courts under this charter was passed November 25, 1692. It provided for a high Court of Chancery, a Superior Court of Judicature, Inferior Courts of Common Pleas, Courts of Quarter Sessions of the Peace, and of single Justices of the Peace. By another act, passed at the same session, authority to grant writs of Habeas Corpus was conferred upon the justices of the Superior Court, and by another act, passed at the same session, it was provided "That all controversies concerning marriage and divorce shall be heard and determined by the Governor and Council." The section for the establishment of a high Court of Chancery was repealed, and a new act substituted, in 1693. The act of November, 1692, establishing the Courts, and the Habeas Corpus act, were disallowed in August, 1695, and the act of 1693 establishing a high Court of Chancery was disallowed in December, 1696. No attempt was afterwards made to reënact it, but under different subsequent acts the common law courts were invested with limited equity powers. An act to revive the Courts temporarily, was passed in 1696; and an act for the reëstablishment of the Courts, with amendments, excepting the Chancery Court, was passed in June, 1697. They were both disallowed in November, 1698, the first upon the ground that it revived the act of 1692, and the second because its provisions conflicted with the jurisdiction of the Court of Admiralty. June 26, 1699, separate acts for the reëstablishment of the Courts were passed, omitting the

objectionable provisions. In these acts the change in name was made, of Courts of General Sessions, in the place of Courts of Quarter Sessions in the act of 1692; and a provision was made that no action should be originally brought in the Court of Common Pleas for an amount under forty shillings unless where freehold is concerned. Neither of these acts was disallowed, and the several Courts as thus established continued without change to the time of the revolution.[58]

In 1701 an act was passed providing an attorney's oath in nearly the language of the oath at the present time[59], and at the same session the justices of the several courts were authorized to make necessary rules "for the more orderly practising in such court,"[60] and acts were passed prescribing the forms of writs and other processes,[61] and in 1709 an act was passed requiring the endorsements of writs.[62] There was no formal recognition of the common law, but the courts of the Province practically adopted it, and followed the precedents and practice of the courts of England.

As finally established, the Superior Court of Judicature, or Superior Court as it was commonly called, consisted of a chief justice and four other associate justices, three of whom constituted a quorum. To this court was given substantially the powers of the Court of Assistants of the Colony, and its jurisdiction embraced all matters, "as fully and amply to all intents and purposes whatsoever as the Court of King's Bench, Common Pleas and Exchequer within his Majesty's Kingdom of England." The act provided for two sessions of the Court annually in this county, one to be held at Salem on the second Tuesday

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[58] 1 Province laws, 367-372. [59] 1 Province laws, 667. [60] 1 Province laws, 464. [61] 1 Province laws, 460. [62] 1 Province laws, 622.

of November, and the other at Ipswich on the third Tuesday of May. This Court had appellate jurisdiction from the inferior courts.

Inferior Courts of Common Pleas were established for the several counties, to be held by four justices appointed for each county, three of whom to constitute a quorum; with original jurisdiction in all actions in which the title to real estate was concerned, and in all other civil actions in which the debt or damage was forty shillings and upwards, with appellate jurisdiction from justices of the peace in civil cases.

Courts of the General Sessions of the Peace were established for each county, to be held by the justices of the peace of the county, and in the act of 1699 was added "or so many of them as are or shall be limited in the commission of the peace," with original jurisdiction in all criminal cases not given to the Superior Court nor triable before justices of the peace, and appellate jurisdiction from single justices of the peace in criminal cases. Any person aggrieved by the sentence imposed by the justices of this court could appeal to the next Superior Court for the county. The reasons for the appeal were to be filed in the office of the clerk of the Superior Court seven days before the sitting of the court, together with an attested copy of the sentence, and attested copies of "all the evidences upon which the same was grounded." This court was afterwards authorized to appoint Masters of the House of Correction, grant licenses, lay out and discontinue highways, also "particular and private ways," when towns unreasonably refused or delayed to approve their laying out by the selectmen, and to assess relatives for the support of the poor.[63]

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[63] 1 Province Laws, 378, 527, 136, 68.

The sessions of the Courts of Common Pleas and of General Sessions were held at the same times and places. For this county they were held at Salem on the last Tuesday in June and December; at Newbury on the last Tuesday in September; and at Ipswich on the last Tuesday in March.[64]

The jurisdiction of single justices of the peace was substantially the same as at the present time. In addition to these courts, in 1694, the King established a Court of Admiralty under the right reserved in the charter.

Judges of the several courts were appointed under the first act, December 7, 1692. The judges of the Superior Court were William Stoughton, chief justice, Thomas Danforth, John Richards, Waitt Winthrop and Samuel Sewall, associate Justices. They were the *de facto* magistrates at the time of the granting of the charter, and three of them had been judges of the Court of Oyer and Terminer. Richards died April 4, 1694, and was succeeded by Elisha Cooke. They were reappointed under the acts of 1696 and 1699.

In the Province period, from 1692 to the time of the Revolution, there were upon the bench of the Superior Court only four judges educated in the law, Benjamin Lynde,[65] Paul Dudley, Edmund Trowbridge and William Cushing. Lynde and Dudley were graduates of Harvard College and both studied law in the Temple in London. Lynde was appointed a justice in 1712, chief justice in 1728, and remained on the bench until his death in 1745. He was the first educated lawyer appointed to the bench. Dudley was appointed a justice in 1718, chief justice in 1745, which place he held until his death in 1752. Trow-

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[64] 1 Province Laws, 284.

[65] Chief Justice Lynde lived in a house corner of Essex and Liberty streets, Salem, which stood on the site of the eastern part of Lynde block.

bridge was appointed a justice in 1767 and remained on the bench until 1774. Cushing was appointed a justice in 1772 and chief justice in 1777 which office he held until his appointment as one of the justices of the Supreme Court of the United States in 1789. Thus from 1712 to 1752 there was an educated lawyer, and a portion of the time two educated lawyers on the bench, and the same from the time of the appointment of Trowbridge in 1767, to the Revolution.

The appointments of judges in this period were made largely through family influence. From the first settlement to the time of the revolution, the offices and political power of the Colony and Province, were confined to certain, not very numerous, families. These families constituted an exclusive social, as well as political aristocracy. The line between them and the commons was strictly drawn, and rigidly observed. Even in the meeting houses there was a magistrate's pew, and families were seated according to rank. There can be no better illustration of the extent to which these distinctions were carried than from the fact that in the catalogue of Harvard College, from its commencement in 1642, to 1773, the names of the graduates of the several years were enrolled, not alphabetically as now, nor with any regard to scholarship, but solely in the order of family rank. The son of a magistrate, whatever his scholarship, was placed among the first, and the son of an untitled citizen, although the first scholar in his class, was ranked among the last.[66]

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[66] "Early in the presidency of Locke, the practice of arranging the students in each class according to the supposed rank of the families to which they belonged, was laid aside. This custom, which had existed from the establishment of the college was the frequent cause of discontent among the students and their families; and as the population of the Province increased, and republican principles began to prevail, the principles of discrimination became more difficult and exciting. The attention of the corporation and overseers was forcibly attracted to the subject by a formal complaint in writing, made to the president and tutors by the

The judges of the Superior Court of this period, appointed by royal authority, imitated the manners and style of the English judges. They wore upon the bench black silk gowns until about 1760, when at the suggestion of Chief Justice Hutchinson, as it is supposed, they adopted in winter scarlet robes with deep facings, cuffs of black velvet, bands and powdered wigs with black silk bags, and in the summer, black silk gowns. Barristers also wore black silk gowns, bands and bags.

This was before the days of *nisi prius* courts, and a quorum of judges, commonly attended by the lawyers, rode the circuits on horseback. It was the custom for the sheriff of the county with a military guard or a body of prominent citizens to meet them at the borders of the shire town, and escort them to their lodgings with great parade. John Adams in a letter to Mr. Tudor described the court before whom the question of granting writs of assistance was argued in 1761. It was held in the east chamber of the old State House in State street in Boston.[67] He wrote, "In this chamber, near the fire, were seated five judges, with Lieut. Governor Hutchinson at their head as Chief Justice, all in their new fresh robes of scarlet English cloth, in their broad bands and immense judicial wigs. In this chamber were seated at a long table all the barristers of Boston, and its neighboring county of Middlesex, in their gowns, bands and tye wigs. They were not seated on ivory chairs, but their dress was more solemn and more pompous than that of the Roman senate when the Gauls

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father of one of the students, stating "that his son has not his proper place in his class," not being allowed to rank with the sons of those gentlemen who were justices of the Quorum, "when he had been himself in the commission of the Peace and Quorum a longer time than any of them." . . . The truth of the complainant's statements was accordingly ascertained, and his son raised to his due rank. 2 Quincy's Hist. Harv. Univ. 157.

[67] The sessions of the Superior Court were usually held in the west chamber of the State House, and the Governor and Council occupied the east chamber.

broke in upon them." The judges of the Province were distinguished for their dignity, courtesy and civility to the bar.

In this period there were many able and learned lawyers. Besides Judges Lynde, Dudley, Trowbridge and Cushing were Auchmuty, father and son, Reed, Pratt, Gridley, Adams, Otis, Thacher, Quincy, Bollan, Ruggles, Jonathan Sewall, Sargent, Lowell, Dana, Pynchon, David Sewall, and many other barristers with a reputation throughout the Province. In this county the barristers before the revolution were, Daniel Farnham of Newburyport, William Pynchon of Salem, John Chipman of Marblehead, Nathaniel P. Sargent of Haverhill and John Lowell of Newburyport. Daniel Farnham was graduated at Harvard College in 1739, and died in 1776 at the age of 59. Hon. Levi Lincoln studied law in his office for a short time. His practice extended into Maine, and he was for a short time King's attorney for the county of York. He had an extensive practice. William Pynchon was born in Springfield in 1725. He removed to Salem in 1745 and studied law with Judge Stephen Sewall. He remained in Salem until his death, in March, 1789, at the age of 64. He was an eminent lawyer, particularly skilled in special pleading; a finished scholar and an accomplished gentleman. John Chipman was son of Rev. John Chipman, and was graduated from Harvard College in 1738. He died at Falmouth, Maine, while attending court, in July, 1768. Nathaniel P. Sargent was born in Methuen in 1731, and graduated from Harvard College in 1750. He held a high rank as a lawyer, although never distinguished as an advocate. He was appointed judge of the Superior Court in 1776 and Chief Justice of the Supreme Judicial Court of the State in 1790, as successor to Chief Justice Cushing. He died in October, 1791, at the age of 60. He

had an excellent reputation as a judge. John Lowell was born in Newbury in 1743, and graduated from Harvard College in 1760. He studied law with Oxenbridge Thacher, and began practice in Newburyport, but early removed to Boston. He was a member of the convention that framed the constitution of this state, was elected a member of Congress in 1781, and in 1782 he was appointed to the Court of Appeals from the Court of Admiralty, in 1789 judge in the United States District Court, and in 1801 Chief Justice of the first circuit of the United States Court. He died in May, 1802, at the age of 58. From him have descended the many very distinguished families of his name in this Commonwealth.[68]

The bar, in legal attainments, was far in advance of the Courts to the time of the revolution; and many instances are related of the trial of causes in which the lawyers took delight in perplexing and confounding the Judges in the technical distinctions they raised. An anecdote is related of Gridley who was one of the ablest and most acute of the lawyers of the time. He was attorney for a minister named Lombard, about the year 1760, who was sued on a bond he had given that he would deliver up to the deacons of the church, the parsonage in Gorham of which he had been the minister, upon the settlement of another minister. Within a year after the giving of the bond the church settled a very illiterate man as minister; Lombard refused to give up the parsonage on the ground that the new incumbent was not the minister intended in the bond. The jury, upon the trial in the Court of Common Pleas, found a verdict for the plaintiffs. Lombard appealed to

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[68] Farnham lived in a house on High Street, opposite the head of Market street in Newburyport, where the Kelley school house now stands. Judge Lowell lived in the house on High street next northerly from the Dexter House.

Pynchon lived in house number 13 Summer street, Salem, now occupied by Dr. J. A. Emmerton.

the Superior Court where the case was again tried and a verdict again rendered for the plaintiffs. Gridley moved in arrest of judgment upon the ground that no issue had been joined; judgment was arrested, and a repleader directed, when Gridley filed a plea in bar reciting that, by the terms of the grant of the township of Gorham, the parsonage was reserved for the use of a pious, *learned*, orthodox minister, etc. Daniel Farnham, for the plaintiff, replied, omitting to put learned, in issue. To this reply Gridley demurred for a departure in the replication, to which Farnham made a joinder in demurrer. After argument the Court decided the replication to be insufficient, and rendered a judgment for the defendant. Lombard was not in court at the time, but entered a few minutes after, when Gridley said to him, "man, you have obtained your cause." Lombard in astonishment, asked "how, sir?' Gridley replied, "you can never know till you get to heaven."

A case is reported, Quincy R., p. 8, which was tried in 1763. It was on a plea of abatement. The defendant was given the addition, blacksmith, in the writ, to which defendant pleaded he was a nailer and not a blacksmith. The point was argued by counsel and the Court was unanimously of the opinion that a nailer was a blacksmith though they disagreed in their reasons for it. In another case, Quincy R., p. 237, tried in 1667, the addition, yeoman, was given a defendant. Auchmuty filed a plea in abatement on the ground that the defendant bore a captain's commission which gave him the addition of gentleman. Mr. Otis, for the plaintiff, contended that the commission did not confer the addition claimed and that if the defendant was a gentleman, it was by courtesy or reputation. The Court made a distinction between courtesy and reputation, and were of the opinion that the de-

fendant was a gentleman both by commission and by courtesy, "Therefore they *ruled that the writ abate.*"

During the Province period jealousies sprang up between the people and the officers appointed by the Crown, and between the Superior Court and the Court of Admiralty which was created and its judges appointed by the Crown. The Superior Court granted prohibitions restraining the Court of Admiralty in what was claimed undue exercise of jurisdiction, which gave offence to the officers of the crown, and was a ground of complaint against the Province. These jealousies increased with time. Judges favoring prerogative were appointed. As the population and industries of the Province increased, restrictive and oppressive acts were passed by the English Government in the interest of the manufacturers and merchants of England. The laws of the customs were specially oppressive, and were, so far as possible, evaded and nullified by the people. In 1761 directions were given to apply to the Court for writs of assistance which, without the ordinary safeguards of a search warrant, would give unlimited right of search to the officers of the Customs. The application was made and caused much excitement and ill feeling throughout the Province. The merchants of Salem and Boston employed counsel to resist the application. At the hearing before the Court, which has been referred to, Gridley appeared for the petitioners for the writs, and Thacher and James Otis in opposition.

The argument of Otis was very able and eloquent and created great enthusiasm among the people. John Adams, then a young barrister, was present during the entire hearing and referring to it afterward said "Mr. Otis' oration against writs of assistance breathed into this nation the breath of life." At the close of the term, Chief Justice Hutchinson announced that the court at present could see

no authority for issuing the writs, but that the cases would be continued, that an opportunity might be afforded to learn what the practice was in England upon the subject. The information was obtained and, at the next term, the question was argued again by Gridley and Auchmuty for the petitioners and by Otis and Thacher against, when the Court granted the writs; but public sentiment was so strong against the proceeding that the officers of Customs did not deem it expedient to attempt their enforcement.

This action of the judges made them, especially Chief Justice Hutchinson, very unpopular with the people, and an attempt was made in 1762 to exclude Judges of the Superior Court from seats in the Council or House of Representatives, which was defeated by a small majority. Afterwards, the General Court, in the exercise of its powers, reduced their salaries. This was followed by an order from the crown in 1772, that their salaries be paid from the royal treasury. This caused very great dissatisfaction with the people. In 1774 the Governor was authorized to appoint judges without the advice and consent of the council, and, at the same time, the authority in the General Court to elect councillors was abrogated, and their appointment by "Mandamus" was assumed by the crown. Three judges, with others, were appointed councillors. These proceedings caused great excitement among the people, and upon the convening of the courts the juries refused to be sworn. The last court held in Boston under the Province Charter was in September, 1774, and it was held without juries. The House of Representatives assembled at Salem, in October of the same year, and resolved itself into a Provincial Congress. This Congress, after new elections, was again convened in February, 1775. By the advice of the Continental Congress a General Court consisting of the last elected Council and Representatives chosen in accordance with the provisions of the charter

and Province laws, assembled in July, 1775. It passed an act declaring all offices created under the royal government void, and the Council assumed the executive powers, the charter having provided that, in the absence of the Governor and the Deputy Governor, these powers should devolve upon that body. The Government was administered under this system until after the adoption of the State Constitution in 1780. The judges in this period were appointed by the Council.

Courts of law were established by the General Court, under the Constitution. They were essentially the same, and with the same jurisdictions, as the Province Courts. But the name of the Superior Court of Judicature was changed to that of the Supreme Judicial Court by the Constitution. The Statute of 1782 provided that the judges appointed to this Court should be men "of sobriety of manners and learned in the law." Under the Colony charter one branch of the legislative department constituted the highest court of law; and, under the Province Charter, Judges of the Superior Court were often at the same time members of the General Court and held other offices. Stoughton at the same time held the offices of Chief Justice, Councillor and Lieutenant Governor, and Hutchinson, the offices of Chief Justice, Lieutenant Governor, Councillor and Judge of Probate.

By the Constitution, the judges of the Supreme Judicial Court, and other officers designated, were forbidden to hold seats in either branch of the General Court, or to hold any other office but that of Justice of the Peace; and the Executive, Legislative and Judicial departments of the Government were made independent of each other in the exercise of their respective powers, "to the end," in the words of the Constitution, "it may be a government of laws and not of men."

By the Constitution it was also provided that all the

laws of the Colony or Province usually practised on in the courts of law, not repugnant to the provisions of the Constitution, should remain in full force until altered or repealed by the legislature, and that all officers of the existing government should perform the duties of their respective offices until others should be chosen or appointed in their place.

Until 1797 the clerk's office of the Superior, and Supreme Judicial Court, was in Boston. Consequently we have no records of either of these Courts in our Clerk's office before that time. In 1797 an act was passed that the Clerks of the Court of Common Pleas should become clerks of the Supreme Judicial Courts in their respective counties. In 1811 an act was passed authorizing the appointment of all the Clerks by the Governor and Council. This act continued in force until 1814 when the appointment of the clerks was transferred to the Judges of the Supreme Judicial Court and, in 1855, by an amendment of the Constitution, it was provided that they be elected by the people.

No other essential change was made in the Courts before 1800. In that year, on account of the increased business in the Courts, the number of judges was increased to seven, and the Commonwealth divided into two Circuits, the Eastern and Western. The Eastern comprised Essex County and all of Maine; the Western all the rest of the Commonwealth except Suffolk County. Three judges constituted a quorum on these circuits. Consequently we had two Supreme Judicial Courts, with the clerk's office for both in Boston. This system was of short duration. In 1804, after much deliberation, a law was passed abolishing the two circuits, reducing the number of judges to five, and authorizing one judge to try questions of fact, with provision for exceptions to a full Court. This act was

amended in 1805, and the system substantially perfected. Thus *nisi prius* courts were instituted, and they have continued without essential change to the present time. The advantages of this system are manifest. Until 1804 all cases were tried before a full court, and it was the practice for all the judges to charge the jury in each case, and it not infrequently happened that the judges disagreed in their statements of the law. In such a case it is easy to conjecture the perplexities of the jury in arriving at a verdict. Under this system there was no tribunal to which parties could carry exceptions. The only mode of rectifying errors was by writ of review.

The relations between the Court and the Bar in this period were not cordial. The lawyers in their forensic contests manifested but little respect for the judges, whom they complained of for the severity of their manners. Referring to the conduct of the judges in this time, Fisher Ames said, that a man should go into court with a club in one hand and a speaking trumpet in the other. Judge Sedgwick, on his accession to the Bench in 1802, was largely influential in effecting a change in the conduct both of the bench and the bar, and Parsons[69] who was appointed

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[69] Chief Justice Parsons, when in Newburyport, lived first in a house on Fair Street, since occupied by Dr. Spofford; afterward he built and lived in the house on the corner of Green and Harris Streets now occupied by Mr. Dole. He erected a small one-story building for his office in front of his house on the corner. In Boston, he lived and died in a wooden house which less than half a century ago was standing next south of a brick block at the northeast corner of Pearl Street.

Sewall succeeded Parsons as Chief Justice, in 1814. He resided in Marblehead where he had practised law before his appointment to the bench. As illustrating the manners of the time I give the following extract from his biography in Knapp's Biographies, p. 226. "I have known him after the labors of the day on the bench, in Salem, ride to Marblehead and officiate as master of ceremonies at the assembly preserving the most perfect order and diffusing delight among the gay, spirited and beautiful votaries of the dance. His presence gave dignity to the amusement, for there is nothing which so tempers and regulates the exuberance of youthful spirits as to find those mingling with them whose characters and standing in society sanction pleasure or business by participating in it." Judge Sewall resided on Pleasant Street, Marblehead, in the house now occupied by Dr. William Neilson.

Chief Justice in 1806, by the exercise of his great power and skill, effected a thorough reform. An anecdote is related of him that, in the trial of a case in which Samuel Dexter was of counsel, the judge confined the parties strictly to the issues, and finally interrupted Mr. Dexter in his argument to the jury, and said to him that he was arguing against both the law and the evidence in the case. Mr. Dexter turned to the judge and said petulantly, "your honor did not argue your own cases when at the bar in the way you require us to." "Certainly not," was the ready reply, "but that was the judge's fault, not mine." Another anecdote is related of a trial in Middlesex County, in which Timothy Bigelow, a leading lawyer of the County, was engaged. In the progress of the trial Judge Parsons stopped him, and said, "Don't waste your time on that point, there is nothing in it." He made the same comment on the next two points made by the counsel, when Bigelow stopped and said, with some irritation, "I regret that I find myself unable to please the Court this morning." "Brother Bigelow," said the judge, "you always please the Court when you are right."

By an act passed in 1804, criminal jurisdiction and bastardy complaints were transferred from the court of General Sessions to the Court of Common Pleas, which left that court with substantially the powers of the County Commissioners at the present time. In 1808 the name of the Court was changed to that of Court of Sessions. By an act of 1809, the Courts of Sessions were abolished and all the powers of these Courts transferred to the Courts of Common Pleas. In 1811 the Courts of Common Pleas were abolished and a Circuit Court of Common Pleas established with the same powers. The same year Courts of Sessions were reëstablished with the powers of these Courts as they existed in 1809, and in 1814, the Courts of Sessions were again abolished and their powers trans-

ferred to the Circuit Court of Common Pleas, but in 1819 the Courts of Sessions were again restored. The Circuit Court of Common Pleas was, in 1820, changed to the Court of Common Pleas, and in 1859 the Court of Common Pleas was abolished and the present Superior Court established in its place. In 1825 an act was passed for the appointment by the Governor of Commissioners of Highways in the Several Counties, except Suffolk and Nantucket. By an act passed in 1827, Courts of Sessions and the office of Commissioners of Highways were abolished, and their powers transferred to boards of County Commissioners created by the same act.

As has been stated, unsuccessful attempts were made in 1687 and in 1692, to establish Courts of Chancery. The English government was opposed to the establishment of these courts in the colonies. Special statutes giving limited equity powers were from time to time passed before and after the adoption of the constitution, and in 1857 general equity jurisdiction was conferred upon the Supreme Judicial Court, which has been enlarged by subsequent legislation, and in 1883 concurrent jurisdiction in equity was conferred upon the Superior Court.

But little change in the practice in the courts was made until 1851, when a code of civil procedure, known as the Practice Act, was enacted by the Legislature, which was improved by another act passed in 1852. It abolished many useless technicalities, and simplified forms and proceedings. The expediency of the change was doubted by the profession at the time, but experience has shown it to be a great improvement. Other less important changes made in the jurisdictions and powers of the courts within the last half a century, it is unnecessary to state, as the information may be readily obtained upon an examination of the printed statutes of the period.

The distinction of attorneys and barristers in the bar

was observed until 1806. The costumes of the judges and barristers were worn for a short time after the Revolution. The last time the judges appeared in gowns was at the funeral of Governor Hancock in 1793. But for many years after, it was the custom both for the judges and the lawyers to always appear in court dressed in suits of black cloth. It is related of Judge Prescott, that whilst at the bar, he created a great sensation by appearing in court wearing light colored nankeen breeches.

When the order of barristers was first established is not known. It was probably introduced by the judges in the latter part of the Province period, in imitation of the order in England, by rule of court. Under the rules, attorneys prepared cases for trial and barristers argued them, in the higher courts. The degree of barrister was intended as an honorary distinction and was conferred not as a matter of right, but in the discretion of the court. The qualifications for the degree are stated in a rule of Court adopted in February, 1781. By this rule it was ordered "that no gentleman shall be called to the degree of barrister until he shall merit the same by his conspicuous learning, ability and honesty, and that the Court will of their own motion call to the bar such persons as shall render themselves worthy as aforesaid." Much formality was observed in Court upon the admission of a barrister to the degree. In the statute of 1782 creating the Supreme Judicial Court, authority to create barristers was conferred, and the Court was given full power to make rules and regulations for the Bar. No barristers were called after 1784. The distinction which the order made, and the opportunity for favoritism in conferring the degree, were not in consonance with the spirit of the time. In 1806 the Supreme Judicial Court adopted a rule prac-

tically substituting counsellor for barrister, and giving all attorneys equal privilege of admission as such upon examination. Any attorney who had been in regular practice for two years might be a candidate for counsellor, and examined therefor. It appears from another rule of Court, adopted the same year, that it had been for some time before, the custom for attorneys to argue cases in the Supreme Judicial Court. By the Revised Statutes, passed in 1836, the distinction between counsellor and attorney was abolished.

A Bar Association for this county was formed in 1806, and rules and regulations adopted. From a copy of the rules and regulations, printed in 1808, it appears that there were then twenty-seven members of the Bar in this county.[70] I find records of the proceedings of this association in 1812. How much longer it was in existence I have been unable to ascertain, but in September, 1831, a new Bar Association was formed. It appears from a printed copy of its rules that there were then fifty-two members of the Bar in the county. The officers for that year were Leverett Saltonstall, president; Ebenezer Shillaber, secretary; Ebenezer Moseley, Jacob Gerrish, John G. King, Rufus Choate and Stephen Minot, standing com-

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[70] The following are the names of the members of the Bar in 1808, taken from a printed copy of the rules and regulations:—

SALEM. Elisha Mack, Benjamin R. Nichols, William Prescott, Samuel Putnam, John Prince, jr., John Pickering, jr., Joseph Story, Samuel Swett, Leverett Saltonstall, Joseph Sprague, jr.

NEWBURYPORT. William B. Bannister, Joseph Dana, Samuel L. Knapp, Edward St. Loe Livermore, Edward Little, Ebenezer Moseley, Moody Noyes, Daniel A. White.

HAVERHILL. Stephen Minot, John Varnum. GLOUCESTER. Lonson Nash, Nathan Parks. MARBLEHEAD. Ralph H. French. IPSWICH. Asa Andrews. BEVERLY. Nathan Dane. ANDOVER. Samuel Farrar. LYNN. John Stuart.

I am indebted to Dr. Henry Wheatland, President of the Essex Institute, for copies of the old bar rules, and other documents from which I obtained much information.

mittee. This association existed but a few years. In 1856 the present Bar Association was formed, which has proved a very useful organization to the profession.

Time will not permit me to give biographical notices of members of our Bar since the Revolution. I would gladly refer to all who have earned distinction, but I must confine myself to the list of names of those who achieved a national reputation—to the names of Rufus King, Chief Justice Parsons, Chief Justice Sewall, Nathan Dane, Judge Prescott, Judge Jackson[71], Judge Story, Rufus Choate, Caleb Cushing, Robert Rantoul, Leverett Saltonstall and Judge Lord. If the living may be referred to, I should add the name of one whom we all respect, a former president of our association, who has honored us on the bench of our highest court, and now honors us in the Executive Council of the nation.

From the brief history I have given, we may trace the steps in the progress that has been made from the time of the humble beginning by Endicott[72] and his little band,

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[71] Judge Jackson lived in the Dexter house, now owned by Mr. Corliss, on High street, Newburyport.

Judge Prescott from 1801 to 1809 lived in house situate on what is now the garden of Mr. W. Goldthwaite, on Essex street, Salem.

Judge Story whilst in Marblehead lived in the house southerly from, and opposite to the town house, in which is now the apothecary shop of William Goodwin; and in Salem, he lived in the brick house 28 Winter street, now occupied by Dr. A. H. Johnson.

Rufus Choate lived in house 12 Lynde street, Salem, now occupied by William D. Northend.

Nathan Dane lived in the three story brick house corner of Cabot and Federal streets, Beverly; now the Ellingwood estate. His office was in the northerly side of his house, with an entrance from Federal street.

Caleb Cushing lived in the house on High street, nearly opposite the head of Federal street, Newburyport, now occupied by Mr. S. Bachman.

[72] Endicott resided a part of the time on his farm in what is now Danversport, it being a grant to him by the General Court, 1 Mass. Col. Rec. p. 97. His house was situate on the southerly side of what is now Endicott street. A part of the time he resided in Salem in a house on Washington street on the northerly side of what is now Church street, on the spot on which is now the building occupied by Geo. W. Buffum. A part of the timber of the Endicott House was used in the building of the present structure. He died in Boston and was buried at King's Chapel, under what is now the sidewalk in front of the church.

two hundred and fifty years ago, within the limits of the municipality in which we are now assembled, to the present time. From a beginning in severe simplicity in government and administration of law, we have, in these centuries, built up a commonwealth, with a government of the people, regulated and restrained by the constitutional safeguards which experience has taught to be necessary and salutary; and with a judicial system, which, if not yet perfected, will bear a favorable comparison with that of any other commonwealth. The important changes in our system have been made in each instance with much care and after great deliberation. There is no profession more conservative than that of the law. The bench and the bar have clung with great tenacity to the forms and proceedings which have been hallowed by time. But this spirit of conservatism must be tempered by the demands of the age, and we should, in the light of the acknowledged improvements which have been made, look forward to greater and more important ones in the future.

I have, in what I have read, attempted to perform the duty to which I have been called by our association, of preparing an historical address upon the bar of, and judicial proceedings in, Essex County. No one can be more sensible than myself of what I have left undone. If the facts I have collected shall be useful to future historians of the Bar, I shall feel that I have done some service to the profession in which is my life-work, and in the character and honor of which I take the greatest interest and pride.

Brethren of the Essex Bar Association,—There is no royal road to eminence at the Bar. The path which leads to it is steep, rugged and thorny. The labor required is long and arduous. He who would aspire to the higher honors of the profession must be grounded in a thorough knowledge of the principles of the law. They are the premises

from which, through processes of sound reasoning, correct conclusions are drawn. If the premises are doubtful, how can we expect the deductions from them to be reliable? Without a knowledge of these principles, derived from long and severe study, no one can be a good lawyer. "The garland is to be won not without dust and heat." Authorities, precedents, decided cases may aid, they may be useful to test conclusions, but no two mooted questions are alike, and they can never supply the deficiency which a want of knowledge of these principles occasions. The student of to-day does not sufficiently regard these truths. He too often reads only the various modern text books which are largely compendiums of adjudged cases. He obtains a superficial knowledge which may pave the way to admission to the Bar, but will surely fail him in the hour of severe trial in the profession.

But it is not only to himself that the student owes the duty of careful preparation. He owes it to the Bar of which he expects to be, or is, a member. Lord Bacon said, "I hold every man a debtor to his profession, from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."

He owes it also to the community which has a right to expect from him wise and sound advice; and above all he owes it to his country which looks to our Profession in times of peril for counsel and aid.

Brethren, great examples are before you. You are to see to it that the reputation of the Essex Bar suffers no detriment at your hands. Endeavor to perform well the high duties to which you are called, and let your motto be

Pro clientibus saepe, pro legė, pro republica semper.

MEMBERS OF THE BAR.

The following list of Attorneys has been principally prepared by Mr. Frank V. Wright. We are also under obligations to Mr. Dean Peabody Clerk of Courts, for copies of names from the Bar book.

The precise date of admissions to the Bar before 1808 cannot in many instances be ascertained. Many since that time, who were admitted in other counties, have practised in this county, and the dates of their commencement to practice here have been given as nearly as could be ascertained. Undoubtedly some names are omitted.

Before 1770.

Daniel Farnham.
John Lowell.
William Pyncheon.
Nathaniel P. Sargent.
John Chipman.

Between 1770 and 1780.

Samuel Porter.
John Pickering.
Samuel Sewall.

1780.

William Wetmore.
Theophilus Parsons.
Moses Parsons.

1781.

Theophilus Bradbury.

1783.

Edward Pulling.
Nathan Dane.

1784.

Rufus King.
Samuel Sewall.

1785.

John Thaxter.
William Lithgow.

1789.

William Symes.

1790.

Asa Andrews.
Dudley Atkins.
John Pinchon.
William Prescott.
John Rowe.
William Amory.

1791.

Dudley A. Tyng.

1794.

William Cranch.
Samuel Putnam.
Thomas Thomas.

1795.

Ichabod Tucker.

1796.

George Bradbury.
Isaac Mansfield.
Charles Jackson.

1800.

Joseph Perkins.

1801.

Edward Little.
William Wetmore, Jr.

1802.

John Varnum.
Joseph Story.

1803.

Joseph Pope.

1804.

Jabez Kimball.
Livermore Dana.
Edw. St. Loe Livermore.
Michael Hodge.
Joseph Dana.
Rufus Hosmer.
Ralph H. French.
George W. Prescott.
Samuel Farrar.
John Prince, jr.

1805.

Joseph Dane.
Daniel A. White.
Samuel Swett.

1806.

Fr. Blanchard.
Stephen Minot.
Nathan Parks.
John Pickering.
Leverett Saltonstall.

1807.

Henry A. L. Dearborn.
Ebenezer Mo. eley.
Lonson Nash.
William B. Sewall.
Joseph Sprague.
William S. Titcomb.
Moody Noyes.
William B. Banister.
John Pike.
Benjamin R. Nichols.

Elisha Mack.
Samuel L. Knapp.
John Stuart.

1808.

Eben H. Beckford.
Joseph Hovey.
Nathaniel Sawyer.

1809.

Benjamin L. Oliver.
John Maurice O'Brien.
David Cummings.

1810.

John Gallison.
John G. King.
Jacob Gerrish.
Samuel Merrill.
Hobart Clark.
Micah Bradley.
Stephen Hooper.
Joseph B. Manning.

1811.

Stephen Emery.
Benjamin Merrill.
Frederick Howes.
Pitman.
Sylvanus Wildes.
Robert W. Trevett.

1812.

Timothy Hammond.
William Burley, jr.
Frederick Hines.
James C. Merrill.
Jacob Willard.
Ebenezer Everett.
Theodore Eames.

1813.

George Newton.
Thomas Stephens.
Edward Andrews.
Octavius Pickering.
John Scott.
Larkin Thorndike.
Isaac Gates.

1814.

Henry Pierce.

1815.

John D. Andrews.
James H. Duncan.
Elisha F. Wallace.
William A. Rogers.

1816.

William Thorndike.
Rufus V. Hovey.

1817.

Thomas M. Woodbridge.

1818.

Andrew Dunlap.
Solomon S. Whipple.
John Foster.
Stephen W. Marston.

1819.

Ebenezer Shillaber.
John W. Proctor.

1820.

Asa W. Wildes.

1821.

Caleb Cushing.
E. Hersy Derby.
Isaac R. How.
Joseph P. Waters.

1822.

Benjamin Wheatland.
Thomas Stephenson.

1823.

John A. Richardson.
Thornton Betton.
Robert Cross.
Rufus Choate.
Robert Rantoul.
George C. Wilde.
William Oakes.

1824.

Joseph H. Prince.
John Walsh.
Joseph G. Waters.

1825.

Benjamin Tucker.
William Stevens.

1826.

Asahel Huntington.
Moses P. Parish.

1827.

Gilman Parker.
Stephen P. Webb.
Jeremiah C. Stickney.
David Roberts.
William S. Allen.
Samuel Phillips.

1828.

David Mack.
George Wheatland.
John Tenny.
Nathaniel J. Lord.
Ellis G. Loring.
Jeremiah Russell.

1829.

Edmund L. Le Breton.
Nathan W. Hazen.
Nathaniel P. Knapp.
Joseph W. Newcomb.

1830.

John Codman.
John S. Williams.

1831.

Alfred Kittredge.
Francis B. Crowninshield.
Amos Spaulding.
Charles A. Andrew.
Charles Minot.
Henry Field.
Nathan Crosby.

1832.

Nicholas Devereux.
Joshua H. Ward.
Ephraim F. Miller.
George H. Devereux.
William G. Woodward.

1833.

John W. Browne.
George Lunt.

1834.

Francis H. Silsbee.

1835.

William Fabens.
Otis P. Lord.
James R. Newhall.
Jonathan C. Perkins.
Augustus Story.

1837.

Thomas B. Newhall.

1838.

Joseph Couch.
Nathaniel F. Safford.
William Taggart.
Francis Cummins.

1839.

William O. Moseley.
Richard West.
Edward P. Parker.
Francis H. Upton.
Joseph G. Gerrish.

1840.

Simon F. Barstow.
Haley F. Barstow.
William Williams.

1842.

Frederick Morrill.
Horace Plumer.
Luther Hackett.
Nathan W. Harmon.

1843.

Daniel Saunders.
George Haskell.
George F. Chever.

1844.

Alfred A. Abbott.
Benjamin F. Mudge.
Benjamin Poole.
Joseph F. Clark.
William L. Rogers.
Isaac Story.
Nehemiah Brown.

1845.

Moses Foster.
Daniel Kimball.
John J. Marsh.
Jeremiah P. Jones.
William S. Stearns.
Benjamin Barstow.
Stephen H. Phillips.
Wm. Dummer Northend.

1846.

Eben F. Stone.
Augustus D. Rogers.
William C. Binney.
Isaac Ames.
Thomas A. Parsons.
Dan Weed.
Thomas Wright.
Horace L. Conolly.

1847.

W. Augustus Marston.
Joseph B. F. Osgood.

1848.

Louis Worcester.
Nathaniel G. White.
George R. Lord.
George F. Choate.
Nathaniel S. Howe.

1849.

William H. P. Wright.
Nathaniel Pierce.
Jairus W. Perry.
B. Frank Watson.

1850.

Eben W. Kimball.
Benjamin C. Perkins.
George Andrews.
Dean Peabody.
William C. Endicott.

1851.

Philo L. Beverly.
Stephen G. Wheatland.
Stephen B. Ives.
John B. Clarke.
William C. Prescott.
Jacob W. Reed.
Ammi Brown.
William Howland.
Daniel E. Safford.
Isaac Brown.

1852.

Sidney C. Bancroft.
Caleb Lamson.
Andrew B. Almon.
James A. Gillis.
Joseph H. Robinson.
Abner C. Goodell.
John N. Pike.

1853.

Charles J. Thorndike.
Charles H. Stickney.
John B. Peabody.
Thomas M. Stimpson.

1854.

Michael B. Mulkern.
Charles P. Thompson.
Hiram O. Wiley.
Isaac C. Wyman.
Henry B. Fernald.

1855.

Francis S. Howe.
Charles W. Upham.
William G. Choate.
George A. Peabody.
Edward K. Phillips.
Thomas P. Pingree.
William H. Perrin.
Charles A. Kimball.

1856.

Robert S. Rantoul.
Harrison G. Johnson.
Charles W. Tuttle.
Joseph H. Bragdon.
C. Osgood Morse.
Edward L. Sherman.
George W. Benson.
Benjamin Bordman.
E. P. G. Marsh.
William A. Herrick.

1857.

Jacob Haskell.
William H. Parsons.
Joseph Eastman.
Harrison Gray.
Henry N. Merrill.
Perley S. Chase.
John James Ingalls.
John Buffington Stickney.
Henry Carter.

1858.

Amos Noyes.
Edgar J. Sherman.
Ephraim Alfred Ingalls.
Munroe Stevens.
William M. Rogers.
Charles Kimball.
David B. Kimball.

1859.

George Peabody Russell.
Alden Tullar.
William P. Upham.
Benjamin H. Smith.
B. G. Hutchinson.
John F. Devereux.
John S. Driver.
Wm. Lawrence Peabody.
Charles Sewall.
Arthur A. Putnam.
Thorndike D. Hodges.

1860.

Henry W. Chapman.
John K. Tarbox.
John C. Sanborn.
William E. Currier.
W. Fisk Gile.
Edward L. Hill.
Thomas A. Cushing.
William Cogswell.
Isaac H. Boyd.

1861.

John Milliken.
Francis H. Berick.
Micajah B. Mansfield.
Alphonso J. Robinson.
Horatio G. Herrick.
George E. Bousley.

1862.

Edward P. Kimball.
Henry G. Rollins.
Horace Langdon Hadley
George Foster Flint.
George Wheatland, Jr.

1863.

Nathaniel J. Holden.
Caleb Saunders.
Frank Kimball.
Minot Tirrell.
Charles S. Osgood.

1864.

Robert B. Brown.
Henry L. Sherman.
Aretas R. Sanborn.
John W. Porter.
George H. Poor.
Henry W. Boardman.
Augustine M. Jones.
Charles A. Sayward.
Solomon Lincoln.
N. Mortimer Hawkes.

1865.

David M. Kelly.
Elbridge T. Burley.
Porter F. Roberts.
John P. Adams.
Eben A. Andrews.
David O. Allen.
William L. Thompson.

1866.

William F. Blunt.
Wilfrid Breed.
John W. Berry.
Charles A. Phillips.
Walter Carter.
Thomas F. Hunt.
William S. Knox.
Warren H. Mace.

1867.

William C. Fabens.
Andrew C. Stone.
George W. Cate.
Robert W. Pearson.
James L. Barker.

1868.

James L. Young.
Henry P. Moulton.
Henri N. Woods.
George Holman.
Horace C. Bacon.
Benjamin E. Valentine.
George W. Foster.
Charles Webb.
J. Kendall Jenness.

1869.

Jeremiah T. Mahoney.
William H. Niles.
Joseph Cleveland.
Nathan N. Withington.
John Edwards Leonard.

1870.

Rollin Eugene Harmon.
Charles E. Briggs.
Benjamin F. Brickett.
Frederick D. Burnham.
John S. Gile.
Hiram P. Harriman.
Henry Wardwell.
Charles G. Saunders.

1871.

William S. Huse.
Samuel A. Johnson.
James H. Giddings.

1872.

John Nance Cheney.
Ira Anson Abbott.
Charles W. Richardson.
Frederick B. Byram.
Ira B. Keith.
William Henry Gove.
Leverett S. Tuckerman
Josiah F. Bly.
William W. Wilkins.

1873.

Arba N. Lincoln.
Joseph E. Buswell.
Charles Upham Bell.
Frank P. Ireland.
Charles A. Benjamin.
Henry C. Hubbard.
Andrew Fitz.
Charles D. Moore.

1874.

Amos E. Rollins.
Louis W. Kelly.
Charles H. Parsons.
Arthur L. Huntington.
Horace Brown.
Frederic A. Benton.
Arthur F. Norris.
Charles Roberts Brickett.

1875.

John P. Sweeney.
Willis E. Flint.
Frank W. Hale.
Nathan D. A. Clarke.
Thomas Huse.

1876.

Edward B. George.
Milon S. Jenkins.
Charles E. Hoag.
Samuel H. Hodges.
Edwin N. Hill.
David Little Withington.
Francis Henry Pearl.
Frank Pierce Allen.

Jerome Horton Fiske.
Henry Francis Chase.

1877.

Henry T. Croswell.
Daniel C. Bartlett.
James E. Breed.
William F. M. Collins.
Henry F. Hurlburt.
Peter William Lyall.
Newton P. Frye.
Charles F. Caswell.
Moses H. Ames.
Eben F. P. Smith.
George F. Mears.
Thomas C. Simpson.
George Galen Abbott.
Charles Allen Taber.
Boyd B. Jones.

1878.

John A. Page.
George J. Carr.
Hiram Howard Browne.
William Henry Moody.
Dennis W. Quill.
Thomas F. Gallagher.
John M. Raymond.
William F. Moyes.
John C. M. Bayley.
Horace Irving Bartlett.
Daniel N. Crowley.
Patrick J. McCusker.
George B. Ives.

1879.

Frank H. Clarke.
Edward P. Usher.
Joseph V. Sweeney.
Michael J. McNeirny.
Joseph F. Hannan.
Forrest L. Evans.
Charles Leighton.
Edwin F. Cloutman.
Charles D. Welch.
Frank V. Wright.
Jacob Otis Wardwell.
Charles G. Dyer.
Charles H. Symonds.
Edward E. Foye.
Theodore M. Osborne.
N. Sumner Myrick.
Daniel J. M. O'Callaghan.
Charles A. Russell.
Charles Howard Poor.

1880.

Benj. Newhall Johnson.
Josiah F. Keene.
Jonathan Lamson.
William A. Butler.
Frank C. Skinner.
Charles S. Wilson.
Frank E. Farnham.
Henry C. Durgin.
Alden P. White.
Charles E. Todd.
William Perry.
Calvin B. Tuttle.
George M. Stearns.
John R. Baldwin.
Samuel Merrill.
Benjamin K. Prentiss.
Frederic G. Preston.
Edward C. Battis.

1881.

Charles A. De Courcy.
Albert Birney Tasker.
John Milton Stearns.
Alfred L. Baker.

1882.

William F. Noonan.
William H. Lucie.
Charles F. Sargent.
William D. T. Trefry.
James W. Goodwin.
Edward H. Brown.
Benjamin C. Ames.
Edward H. Rowell.
John C. Pierce.
Nathaniel C. Bartlett.
Edwin A. Clark.
George L. Weil.
Tristram F. Bartlett.
Nathaniel N. Jones.

1883.

Marshman W. Hazen.
Charles A. Weare.
Thomas H. Ronayne.
Sumner D. York.
Frank C. Richardson.
William A. Pew.
George E. Batchelder.
Melville P. Beckett.
Edmund B. Fuller.

1884.

Samuel A. Fuller.
Eugene T. McCarthy.
William T. McKone.
Joseph F. Quinn.

1885.

John R. Poor.
George H. Eaton.
Warren B. Hutchinson.
John J. Flaherty.
Jeremiah E. Bartlett.
Byron E. Crowell.
Robert E. O'Callaghan.
Cornelius J. Rowley.
Robert T. Babson.
Richard E. Hines.
John C. Donovan.
Thomas Keville.